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THE CHANGING LAW OF COMPETITION IN PUBLIC SERVICE

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Until very recently it could be said with much assurance that American law favors free competition in practically all businesses, including public utilities.[1] For example, a public utility could not, in general, prevent a rival utility from competing and thereby absorbing the other's business.[2] The theory was that the various interests (*i.e.*, human wants, claims or desires) involved in such cases would be best secured by curbing monopoly and encouraging competition.[3] Thus, in a comparatively recent case, the West

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[1] In England the attitude toward monopoly and competition has been somewhat different. In 1861 an English judge said in a leading case: "It is a mistaken notion that the public is benefitted by pitting two railway companies against each other till one is ruined, the result being, at last, to raise the fares to the highest possible standard." Vice-Chancellor Wood, in Hare *v.* London etc. Ry. Co., 2 Johns. & H. 80, 103. As to the general English attitude toward monopoly, see Simpson, "How Far Does the Law of England Forbid Monopoly," 41 L. QUAR. REV. 393 (1925).

In medieval times it appears that "a regulated monopoly with the corresponding obligation of public service seemed * * * * * to the great majority of people far better than an unregulated competition without public obligation." See 1 WYMAN, PUBLIC SERVICE CORPORATIONS §2 (1911).

[2] See, *e.g.*, Clarksburg Electric Light Co. *v.* City of Clarksburg *et al.*, 47 W. Va. 739, 35 S. E. 994 (1900), discussed in this article. The court considered the question from another angle. See also United Railroads of San Francisco *v.* City and County of San Francisco, 249 U. S. 517 (1919). The latter decision is due in part to state constitutional provision, but is a good illustration of the policy of free competition. *Cf.* Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420 (1837). Of course, statutes sometimes protected public utilities against competition. See The Binghampton Bridge, 3 Wall. (U. S.) 51 (1865). See also Acts of West Virginia 1882, c. 159, as to ferries and toll bridges, and Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396 (1880).

[3] Of course, the cases did not generally express it thus. A leading West Virginia case is West Virginia Transportation Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600 (1883). See 3 WILLISTON, CONTRACTS §1651 (1920).

Virginia Supreme Court of Appeals, rigidly upholding this theory, said:[4]

> "The common law condemns, as against public policy, agreements between public service corporations, of a character to prevent free competition in the interest of the public * * * * *. The courts have always condemned monopolies when brought before them.[5] They must continue to do so * * * * * *. 'Competition is the life of trade.' "[6]

A few decades ago this doctrine could be justified, to a considerable extent at least, both in theory and by results. For some time public opinion had favored the principle of *laissez faire.*[7] It was thought that the most desirable thing was the least possible governmental interference with business relations. The legal regulation of public utilities did not adequately guard against the evils of monopoly. Therefore, since "every opinion tends to become a law," as Mr. Justice Holmes tells us,[8] the law favored free competition. But today public opinion no longer looks with special favor on *laissez faire.* We see the advantages in a regulated monopoly. We realize more fully that when the interests of society, the social group, conflict with the interests of the individual, the interests of society are, as a rule, more important than the interests of the individual. And we are, in general, effectively regulating against the evils of monopoly in public service. Accordingly the law, tending to crystallize public opinion and to meet changing conditions, is tending to emphasize the interests of society rather than the interests of individuals, and, to the extent that such social interests outweigh the individual interests, to sacrifice the individual interests,[9] particularly the individual interests of public utilities.

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[4] Charleston Gas Co. *v.* Kanawha Gas Co., 58 W. Va. 22, 50 S. E. 876 (1905). The quotation is partly from the syllabus (by the court) and partly from the opinion, pp. 25 and 28.

[5] But see Hare *v.* London etc. Ry. Co., *supra* n. 1, and Simpson, *op. cit., supra* n. 1.

[6] See to the same effect State *ex rel.* Snyder *v.* Portland Natural Gas and Oil Co., 153 Ind. 483, 53 N. E. 1089 (1899): "It is an old and familiar maxim that competition is the life of trade, and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests and is therefore deemed to be unlawful, on the grounds of public policy."

[7] See WYMAN, *op. cit., supra* n. 1, §§27-33 incl.

[8] In Lochner *v.* New York, 198 U. S. 45, 76 (1905). See also Holmes, J., in Tyson & Bro.—United Theatre Ticket Offices *v.* Banton, 47 Sup. Ct. Rep. 426, 433 and 434 (1927).

[9] See POUND, THE SPIRIT OF THE COMMON LAW 195 ff. (1921).

Perhaps it should be parenthetically explained in passing that while the phrase "public interests" strictly refers to the interests of the state, either as a juristic person or as guardian of the interests of society,[10] nevertheless, out of deference to common usage, the phrase "public interests" is herein used as including the interests of society generally, *i. e.*, social interests.

Quaere, then, can the policy of free competition in public service be justified under our present-day legal theory and economic conditions? Does the old policy of unrestricted competition secure today the more important "public interests" and sacrifice only the less important interests? It is the purpose of this paper to attempt to prove that it does not, and that accordingly the law of public utilities, in furtherance of the end of law,[11] is today tending toward a policy disfavoring unrestricted competition and favoring regulated monopoly or, if promotion of "public interests" requires it, favoring regulated competition. Thus, only a a few days ago the West Virginia Supreme Court of Appeals, showing a welcome change of front as to competition in public service, almost threw its old policy overboard.[12] In holding that the statutory authorization of the State Road Commission, which permitted competition between two common carriers, did not conclusively give the new utility a right to compete in such service, the court made this highly important declaration:[13]

> "*The policy of the state* as evidenced by the road law and of the statutes relating to the public service commission, its powers, and duties, *is not to invite or encourage ruinous competition* between public carriers: *on the contrary its policy is to protect such public servants* in the enjoyment of their rights, *so that the public may be served most effi-*

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[10] See POUND, OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW 4 (1919).

[11] The end of law today is, according to Dean Pound, to secure a maximum of human wants or interests with a minimum sacrifice of other wants or interests, "to satisfy social wants—the claims and demands involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 59-99 (1922).

[12] Reynolds Taxi Co. *v.* Hudson, 136 S. E. 833 (W. Va. 1927). The court actually held that the orders of the Commission permitting competition are reviewable by certiorari. The court was not called upon to hold that the commission was wrong in permitting competition. But the court emphatically espoused the new policy.

[13] *Ibid.*, p. 835. Italics ours. See n. 12.

ciently and economically, and by the best equipment reasonably necessary."

It is true that the West Virginia Court had made this same declaration in a case decided in 1925,[14] but in that decision, the first edition[15] as it were, the new policy did not display such possibilities as in the much more important 1927 edition. So far as this declaration of new policy goes, it is, in general as we shall see, eminently sound. But it is not altogether clear as to how far it actually goes. In the first place, does the new policy, as this declaration purports, apply only to public "carriers"? Or does it apply also to public utilities generally? And in the second place, is the new policy (1) a policy substituting regulated monopoly for free competition, or is it (2) a policy substituting regulated competition for free competition? Since there is some conflict of opinion as to whether the new policy should be (1) or (2), it would seem worth while to consider (a) whether, upon principle, the new policy should be (1) or (2), and (b) whether, under the authorities including the West Virginia cases, the recent tendency is to support (1) or (2).

First, then, what should the new policy be? When two or more public utilities, any one of which could properly serve a given community, are competing to serve such community, if the law favors free competition, there is, to some extent, a duplication (or perhaps a triplication or quadruplication) of investment, organization, and overhead expense. Now, normally a public utility under governmental regulation is constitutionally entitled, after deducting proper operating expense, to earn, if it can, a reasonable return upon the fair "value" of its property devoted to public service,[16] and fair value generally includes prudent "investment."[17] Therefore, if all the competing public utilities

[14] Princeton Power Co. *v.* Calloway, 99 W. Va. 157, 128 S. E. 89 (1925).

[15] Carson *v.* Woodrow, 95 W. Va. 197, 120 S. E. 512 (1923) seems to be the first West Virginia case in point, but that decision contains no declaration of new policy.

[16] Smyth *v.* Ames, 169 U. S. 466 (1898); Galveston Electric Co. *v.* Galveston, 258 U. S. 388 (1922).

[17] State of Mo. *ex rel.* Southwestern Bell Telephone Co. *v.* Public Service Commission of Mo., 262 U. S. 276, 308-309 (1923). Mr. Justice Brandeis says (Mr. Justice Holmes concurring): "What is now termed the prudent investment is, in essence, the same thing as that which the court has always sought to protect in using the term 'present value'." See Hardman, "Recent Developments in Regard to Rate Regulation," 30 W. VA. L. QUAR. 70 (1924).

are permitted to realize such a reasonable return, it is quite obvious that the public must pay more than if the service was rendered by one regulated utility. Moreover, in such cases the public will, in the long run, generally get no better service and probably will get worse service than if the service was rendered by a single properly regulated utility, for the law requires a full-fledged[18] public utility to render adequate service at reasonable rates, unless, of course, there is a legal excuse for failure to serve adequately. Cut-throat competition may injure all the competing utilities to such an extent that all these utilities together cannot render proper service.[19] If all the utilities cannot realize a reasonable return, then, since a public utility cannot generally be compelled to operate at a loss,[20] one or more of them will, in the long run, as a rule at any rate, either render inadequate service or discontinue service, or do both, having also, in all probability, greatly damaged the property and service of the other utility or utilities.[21] Consequently a service, which, by virtue of being a public service, is essential to the public welfare,[22] may deteriorate in quality and cost the public more than if rendered by one regulated utility. Therefore, in such cases, the important public interests in having adequate public service and service at reasonable rates are by the policy of free competition unduly sacrificed in order to secure the less important individual interest of the competing utility, and frequently without securing such individual interest.

Furthermore, to encourage this sort of competition is to discourage, and often prevent, people from investing capital in public service business, or to induce withdrawal of capital from such business. But to permit this is to fail to secure the paramount public interest in having adequate public service; for adequate public service requires ade-

[18] All businesses which are under some governmental regulation on the ground that they are "affected with a public interest" cannot be said to be "full-fledged" public utilities in the sense that they must render adequate service at reasonable rates. See German Alliance Ins. Co. *v.* Kansas, 233 U. S. 389 (1914), and In re Opinion of the Justices, 247 Mass. 589, 143 N. E. 808 (1924). Compare Tyson & Bros.—United Theatre Ticket Offices, Inc. *v.* Banton, 47 Sup. Ct. Rep. 426 (1927).

[19] See Choate *v.* Illinois Commerce Commission, 309 Ill. 248, 141 N. E. 12 (1923).

[20] See Brooks-Scanlon Co. *v.* Railroad Commission of Louisiana, 251 U. S. 396 (1920), Notes, 37 HARV. L. REV. 368 (1924).

[21] See, *e.g.*, Trescot Transfer Co. *v.* Sawyer, 136 S. E. 481 (S. C. 1927).

[22] See my note, "What Constitutes a Public Service," 26 W. VA. L. QUAR. 140 (1920).

quate capital invested and available for investment. Therefore, the law must protect investors in public utility enterprises from losses likely to result from unreasonable competition.[23]

Finally, free competition is not necessary today in order to secure proper public service, for today public service commissions require full-fledged public utilities[24] to render adequate service for reasonable compensation. Of course, at common law public utilities were subjected to considerable court control, *e.g.*, a full-fledged public utility, such as a common carrier, could not charge unreasonable rates. But the legal (largely common-law) control of a few years ago was neither so rigorous nor so far reaching as the common-law control and the legislative and administrative regulation of public utilities today. When the American common law put its condemnation on "monopolies" in general, the somewhat uncertain condition of the law of public utilities seems to have prevented our courts from seeing that, in fact, the law of public utilities, by requiring adequate service at reasonable rates, could have prevented the usual evils of monopoly and at the same time have retained its many above-mentioned advantages.[25] But today, as has been intimated, the law of public utilities, mainly through public service commissions, effectively requires full-fledged public utilities to render adequate service at reasonable rates. Hence, if there was any reason for the principle of free competition in public service in those days, that reason has ceased, and under the time-honored common-law doctrine of *cessante ratione cessat et ipsa lex*,[26] the reason for this principle having ceased, the principle itself should cease, since the principle, if applied today, would not secure the more important interests and sacrifice only the less important interests and therefore would not promote the true purpose of law. Accordingly, partly under this common-law doctrine and partly in furtherance of legislation, many courts, in recent years, are beginning to change the prin-

[23] See *Re* Portland Taxicab Co. (Me. P. U. Com.), P. U. R. 1923E, 772, 780.
[24] See n. 18, *supra*.
[25] *Cf.* 2 MORAWETZ, PRIVATE CORPORATIONS (2nd ed.), §1131 (1886).
[26] See 2 BLACKSTONE, COMMENTARIES 390, 391 (4th ed. 1770).

ciple or policy applicable to such public utility cases.[27] Thus, the Supreme Court of Wisconsin in upholding an agreement between two competing telephone companies not to compete, said, per Winslow, C. J. (concurring) :[28]

> "The policy of this state, as evidenced by the public utilities act, contemplates * * * * * situations where the public will be served by one public utility to the exclusion of competing companies of the same kind, and where the ordinary effects of such a monopoly, to-wit, the raising of rates of service to excessive figures, will be prevented by the utilities commission. The idea of the law is that monopoly so regulated is preferable to ruinous competition * * * * *. In my judgment the public utilities law changed the policy of the state with reference to competition between utilities of this kind."

Similarly, Siebecker, J., in the principal opinion, said:[29]

> "The objects of the contract are in harmony with the policy of the state, embodied in the legislative regulations of public utilities, namely, that the public welfare as regards these enterprises is best promoted through such means as affords the highest practical efficiency at the lowest cost, and that this may be best accomplished by uniting existing facilities, under proper control and regulation, to meet the public convenience and necessity, having regard for existing property interests and the rights and privileges appertaining thereto."

Many states, including West Virginia, require that certain common carriers shall, before starting to serve a given community, secure from some authorized administrative officer a certificate of convenience,[30] *i.e.*, a certificate to the general effect that public convenience reasonably requires such service. It is true that the cases illustrating the new policy generally involve an application of these statutes, though the Wisconsin Case just discussed does not involve such a statute. But in some jurisdictions, not including West Virginia,[31]

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[27] In addition to the West Virginia cases cited, *supra*, see Logan County Bus Co. *v.* Ellis, 100 W. Va. 32, 129 S. E. 751 (1925); Pocahontas Transportation Co. *v.* Craft, 100 W. Va. 240, 130 S. E. 468 (1925). See collecting and discussing some of the cases on this question, Ingram and Breckenridge, "Motor Bus Competition with Established Carriers," 9 IOWA L. BULLETIN 268 (1924); Note, "Policy as to Competition between Utilities," 24 MICH. L. REV. 393 (1926).

[28] McKinley Telephone Co. *v.* Cumberland Telephone Co., 152 Wis. 859, 140 N. W. 88 (1913).

[29] *Ibid.*

[30] Acts of West Virginia 1925, c. 17, §82. See also as to "waterpower" companies, W. VA. CODE 1923, c. 54B.

[31] *Ibid.*

the requirement of certificates of public convenience extends to public utilities generally.[32] And, in general, the same principle applies, to a greater or less degree, to all public utilities. But it remains to be seen how far the new policy will be applied in the absence of some such statutory requirement or declaration of policy.

As we have seen the new declaration of policy in West Virginia purports to apply to "public carriers."[33] And this is true in some other states. But this implied limitation, so far as it is a limitation, may be explained, in part at least, on the ground that the cases involved were dealing only with "carriers," and as every lawyer knows the courts generally state their reasoning with reference to the facts of the particular case, deciding no more than it is necessary to decide. In this connection it is worth noting that the West Virginia statute does not require a certificate of convenience for all public carriers; yet the declaration of new policy purports to apply to all "public carriers," though perhaps other parts of the opinion[34] limit its application to some carriers only. *Quaere,* then, where the statutory certificate of convenience is required only in case of public carriers, or some public carriers, and there is no other statutory declaration of policy, does the new policy apply, in proper cases, to public utilities generally?

For example, a West Virginia statute requires that "water power" electric companies, before condemning easements and rights of way, shall get a "permit" from the public service commission.[35] Such a "permit" is not exactly the same as the certificate of public convenience required in case of carriers.[36] But the commission has a wide discre-

[32] See "Current Legislation," 24 COL. L. REV. 528 (1924), collecting and commenting on the statutes.

[33] Reynolds Taxi Co. *v.* Hudson, *supra* n. 12.

[34] Reynolds Taxi Co. *v.* Hudson, *supra* n. 12.

[35] *Ibid.* And see Princeton Power Co. *v.* Calloway, *supra* n. 14.

[36] W. VA. CODE 1923, c. 54B, §§3, 8, 17, 18, 22. Section 3 empowers hydroelectric companies "to acquire by condemnation, within the limits only of the territory designated by the public service commission, the necessary land for * * * * transmission lines." Section 8 provides: "Such corporations shall have the right and authority to acquire by condemnation, within the limits only of the territory designated by the public service commission, easements, ways, and rights of way * * * * * * upon which to erect towers, poles or wire lines for the transmission, supply and sale of electrical or other energy or power produced by water as a motive force or by steam power or otherwise." Section 17 provides: "Before such corporation shall exercise any of the powers herein authorized * * * * the permit provided for in section three "shall be obtained from the public service commission."

[37] It is, however, much the same. As to certificates of public convenience see Acts of W. Va. 1925, c. 17, §82, class H.

tion in granting or refusing such permits.[37] Suppose, then, that the community which a new hydro-electric company wishes to serve is already adequately served at reasonable rates and that the established electric utility can continue to render adequate service at reasonable rates. Should the new hydro-electric utility (in the absence of *unequivocal* legislative authority) be allowed to condemn a right of way to such community for the purpose of competing with the established utility? Under the old policy favoring free competition, yes. For, as we have seen, vigorous competition, rather than monopoly, was supposed to promote the great "public interests." And the courts might so hold today; for the new declaration of policy purports to apply only to "public carriers" where a "certificate of convenience" is required, and such hydro-electric company is not a public carrier, and, as has been seen, the required "permit" is not exactly the same as a certificate of convenience. Nevertheless, it is submitted that (in the absence of other possible facts hereinafter discussed) the new policy should be applied to such a case. For, as has been shown, the public interests involved in such cases are more efficiently and economically secured by regulated monopoly than by free competition. Surely, the law cannot justify condemning private property, which can be done only "for public use," if such condemnation is injurious to the public as well as to the private owner. The only reason why the law permits condemnation of private property is that the public will be benefitted thereby. As the Supreme Court of Appeals of West Virginia said in a leading case,[38] in order to condemn private property it must be shown that the "public use" for which the property is to be condemned is "clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience." Therefore, the commission should not grant a "permit" to the new hydro-electric company to condemn property in order to compete with such established utility. And if the commission should grant a permit under such circumstances then it would seem that by analogy to the latest West Virginia case such authorization of "ruinous competi-

[37] See W. VA. CODE, 1923, c. 54B, particularly §§17, 18 and 22.
[38] In Varner v. Martin, 21 W. Va. 534, 556 (1883).

tion" should be reversed by the court on the ground that it is unreasonable and contrary to the now recognized policy of the state to protect public utilities and the public against such competition as is detrimental to the public welfare.

If the new electric company is not a "water power" company and therefore is not required to secure such a "permit" before condemning property, the question of its right to condemn in such a case is more doubtful; for in such cases the West Virginia statute in very general language provides that "private property may be taken * * * for electric light companies * * * * when for public use."[39] But in the light of the latest declarations of policy it would seem that, in the absence of specific legislative authority, such a utility should not be allowed to condemn in such a case. For, as intimated, the only reason why the law permits private property to be taken by condemnation is that the promotion of public interests requires that the individual interest of the property owner be sacrificed for the public good. But in this case, as has been shown, the public good will be better promoted by having the community served by one regulated utility rather than by two competing utilities. Therefore, since the applicable legislation simply says that private property "may be taken * * * [for such a company] when for public use,"[40] such general legislation should not be interpreted as authorizing a taking when, as in this case, *the taking will be injurious to the public as well as to the private owner,* for the only justification for condemnation is completely lacking. Such an interpretation does no violence to the language of the statute, but, by an application of a judicially and legislatively recognized principle against ruinous competition and by an application of the principle justifying condemnation, such an interpretation reaches the more desirable result.

Hence, it would seem that *in proper cases* the new policy should be applied to public utilities generally even in the absence of a requirement of a certificate of convenience or other statutory intimation of policy. What is a "proper case" should depend on whether an application of the

[39] W. VA. CODE 1923, c. 42, §2.
[40] *Ibid.*

new policy would secure the important public interests better than an application of the old policy. If, for example, the established utility is using an expensive method of generating electrical energy, and there is, as a practical matter, no less expensive method available for the local utility, and the new utility seeking to compete is generating electrical energy in large quantities by water power and much more cheaply than the local utility can, it would seem, on first thought at least, that generally competition should be permitted in the interest of the public. But it is submitted that here the new policy should take the form of allowing the local utility to compel the new hydro-electric utility to wholesale electrical energy to the established utility for distribution to the public, provided that the new utility is holding itself out to serve the public through some distributing utility. There is a difference of opinion among the few authorities touching upon the last question, but the view supported by the better cases and by the better reasoning is that such a generating utility supplying electrical energy at wholesale to a distributing public utility is performing a public service subject to the regulations of the public service commissions.[41] It would seem that supplying electricity directly to the public is a different class of service from supplying electricity to a public utility for distribution to the public,[42] and, if so, such a generating utility could not, generally speaking, be thus compelled to wholesale for retail unless it holds itself out to render that class of service to some distributing utility. But if it holds itself out to render that class of service to one distributing utility, it is holding itself out to the public through a distributing utility and it must not discriminate against another public utility similarly situated and demanding similar ser-

[41] See North Carolina Public Service Company *v.* Southern Power Co., 272 Fed. 837 (1922); Southern Oklahoma Power Co. *v.* Corporation Commission, 96 Okla. 53, 220 Pac. 370 (1923); Acker, Merrall & Condit Co. *v.* N. Y. Edison Co., P. U. R. 1919B, 272 (N. Y. P. S. C. 1st Dist. 1918); North Carolina Public Service Company etc. *v.* Southern Power Co., 179 N. C. 18, 101 S. E. 593 (1919); North Carolina Public Service Co. etc. *v.* Southern Power Co., 179 N. C. 330, 102 S. E. 625 (1920); Salisbury and Spencer Ry. Co. etc. *v.* Southern Power Co., 180 N. C. 422, 105 S. E. 28 (1920); Public Service Commission of W. Va., Rate Circular No. 2 (1924) pp. 68, 69. Compare Morgantown et al. *v.* Hope Natural Gas Co., 1 Decisions Public Service Commission of W. Va. 555 (1919); Peoples Natural Gas Co. *v.* Public Service Commission, 79 Pa. Superior Ct. 560 (1922); In re United Fuel Gas Co. Public Service Commission of W. Va., Bulletin No. 91 (1925), not unanimous. But see Southern Ohio Power Co. *v.* Public Utilities Commission of Ohio, 110 Oh. St. 246; 143 N. E. 700 (1924); Colorado Power Co. *v.* Halderman, 295 Fed. 178 (1924).

[42] See North Carolina Public Service Co. *v.* Southern Power Co.. 179 N. C. 330, 333, 102 S. E. 625 (1920).

vice for the public.[43] In this way by preventing competition there will be no duplication of equipment in the community already served, the streets will not be torn up and cluttered up with two sets of poles and wires to the injury of important public interests, and the service will be rendered more economically. The generating utility will be entitled to reasonable compensation for service supplied, and at the same time the public interest in protecting the established utility which is required to serve the public properly is adequately secured. Thus, a policy of regulated monopoly rather than of free competition would here secure the important public interest in having adequate service at reasonable rates, and at the same time would adequately secure the interests of both utilities.

Perhaps there is no better case to illustrate this problem than the decision of the Supreme Court of Appeals of West Virginia in *Clarksburg Electric Light Company* v. *City of Clarksburg*.[44] In that case the municipality of Clarksburg had granted to the Clarksburg Electric Light Company an exclusive franchise to use the municipality's streets for twenty years for transmitting electricity for public use in the municipality. Within the twenty year period the Clarksburg Electric Light Company sought to enjoin a competing electric company from applying to the council of Clarksburg for a franchise to supply the same community and to enjoin the municipality from granting a franchise to the competing utility. The municipality had legislatively granted power to "control" the streets and light the same. This admittedly gave the municipality power to grant a franchise to an electric company to use the city streets for poles, etc., but the question was, should the grant of power be construed to include power to "control" the streets by giving to a public utility an *exclusive* franchise to use the streets for this purpose. The court held that this grant of power could not be so construed, for the reason that "such franchises constitute monopolies, which the law has through the ages condemned, because

[43] See generally the authorities cited in note 41, *supra*, except the two cases last cited. See particularly the case referred to in note 42, *supra*, and authorities therein cited.

[44] 47 W. Va. 789, 35 S. E. 994 (1900).

they tie down and restrain and cripple the public right and interest, and sacrifice great public interests to the benefit and aggrandizement of the few."[45]

It is thus obvious that the question whether such a grant of power shall be construed to authorize an exclusive use of the streets by a public utility depends primarily upon the question whether the law adopts a policy favoring free competition or a policy favoring regulated monopoly in such public service. Accordingly, it is submitted that the case, though supported by the generally accepted view,[46] should be decided *contra* today, and should be decided *contra* for the very reason which the court uses to support its decision, *viz.*, that competing electric companies using the same streets rather than only one utility so using them, would, in the language of the court, "sacrifice great public interests to the benefit and aggrandizement of the few." For reasons already shown, a well regulated monopoly, under present conditions, would better secure the "great public interests" in having proper public service at reasonable rates. Then, too, the public interest in not having the streets unnecessarily obstructed with two or more sets of electric light poles, conduits or other equipment is entitled to much weight. Therefore, it would seem that where one public utility can adequately serve the community, the "great public interests" are best secured by holding that the power to "control" the streets should be construed to mean power to control the streets by providing that only one regulated public utility can obstruct the streets for the purpose of serving the people of the municipality.

Similarly, it is generally held that agreements between public utilities to pool their earnings,[47] or not to compete,[48] are not enforceable, because, as the cases say, such agreements are contrary to the policy of free competition, or, as it is often put, are contrary to public policy. But it is obvious that here too the reasons for the new policy apply with special force, for the additional reason that the "other"

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[45] *Ibid.*, at p. 742.

[46] See Gas Company *v.* Parkersburg, 30 W. Va. 435; 4 S. E. 650 (1887); 3 DILLON, MUNICIPAL CORPORATIONS, (5th ed.) §§1215-1219 (1911).

[47] See 1 WYMAN, PUBLIC SERVICE CORPORATIONS §694 (1911).

[48] See 1 WYMAN, *op. cit., supra* n. 47, §§693, 694.

competitor is not complaining. Accordingly, some decisions have recognized the validity of such agreements in proper cases of this sort.[49] And it may perhaps be prophesied with considerable assurance that the law of the future will tend to abandon the policy of free competition in this class of cases.[50]

It would seem then that, in the absence of clear legislative provision to the contrary, the law may "imply" a limitation on the policy of free competition in all cases in which a policy restricting competition will better serve the "public interests." But how far should competition be restricted? Will a policy of regulated monopoly rather than a policy of regulated competition better serve the most important interests? It seems to the writer that the new policy is neither the one nor the other exclusively. It is rather that composite of the two policies which will best secure the public interests in having proper public service at reasonable rates without unreasonably sacrificing the individual interests of the utilities and the public interest in securing such individual interests. To illustrate, where one established utility without competition is rendering adequate service at reasonable rates and can continue to do so, a policy of regulated monopoly will, for reasons already stated, best secure the most important interests. Similarly, where the one established utility is not rendering such service but under proper regulation (*e.g.*, administrative regulation requiring proper extension of service) such utility can be expected to render such service. Likewise, where there is no established utility and two or more competing utilities are simultaneously seeking certificates of convenience or other state-granted authority, if one can serve the community properly and at reasonable rates, only one—the one more likely to render the more satisfactory service—should be authorized; if all applicants are equally likely to render such service, the equities being equal as it were, it would seem that priority of application should govern. But where for any reason it appears that one utility, *e.g.*, an

[49] See, *e.g.*, McKinley Telephone Co. *v.* Cumberland Telephone Co., *supra* n. 28.

[50] The Federal Transportation Act of 1920 adopts the new policy in certain respects. See note, 24 MICH. L. REV. 393, 397 (1926) discussing some of these questions.

established utility, cannot, under governmental regulation, be depended upon to render adequate service at reasonable rates, then the public interests will generally be better secured by a policy of regulated competition. In other words the new policy should in general simply substitute for the old régime of free competition such regulation as will best secure the paramount public interest in having proper public service at reasonable rates without unreasonably sacrificing the interests of any established utility.[51] And in the main the courts and commissions, so far as they have passed on this question, seem to have refrained from tying themselves down to any inflexible interpretation of the recent policy.

The above quoted declaration of new policy by the West Virginia Court is a typical example.[52] The court says that the new policy is "not" to "encourage ruinous competition."[53] May this, in the light of the theretofore recognized policy encouraging competition, be interpreted as a policy encouraging competition short of "ruinous competition"? In general it would seem not, for the court goes on to say that "its policy is to protect such public servants * * * * *so that the public may be served most efficiently and economically, and by the best equipment reasonably necessary.*[54] And this sort of protection involves protection against unreasonable competition. It also involves protection against any competition when the public interests in efficient and economical public service are best served by regulated monopoly, unless there is some more important interest to the contrary. But is this protection primarily a protection of the interests of the utility or is it primarily a protection of the interests of the public in having adequate efficient and economical public service?

Though there is a somewhat earlier case on the question in West Virginia,[55] the earliest specific declaration of new policy was enunciated in *Princeton Power Company* v. *Callo-*

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[51] *Cf.* Siebecker, J., in McKinley Telephone Co. *v.* Cumberland Telephone Co., *supra* n. 28.
[52] Reynolds Taxi Co. *v.* Hudson, *supra* n. 12.
[53] *Ibid.*
[54] *Ibid.* Italics ours.
[55] Carson *v.* Woodram, 95 W. Va. 197, 120 S. E. 512 (1923).

way.[56] In that case, the West Virginia Supreme Court of Appeals, reversing the circuit court, held that an electric railway, adequately serving the public along its line, may enjoin owners of taxicabs from operating them regularly over the public road paralleling the railway and soliciting business along the route. It is true that the owners of the taxicabs had licenses from the State Road Commission only to operate their cars for hire and had no permit authorizing them to operate their cars over the regular route between fixed termini. It is also true that the statute provides that no such permit shall be issued until it shall be established to the satisfaction of the commission that the privilege is necessary or convenient for the public and that this service is not being adequately performed by any other person. But under a proper interpretation of the new policy might not the same conclusion be reached even if the statute did not require such a permit? The emphasis of the court's general argument seems to be largely, if not primarily, that the new policy is to protect the established utilities *"in the enjoyment of their rights"* and that until the competing utility got authority from the commission to compete, the "rights" of the established utilities were to be protected against *"unauthorized"* competition. It is submitted, with great deference, that, to this extent, this interpretation of the new policy tends to put the primary emphasis on the wrong thing. The chief purpose of the new policy is to protect the paramount public interest in having proper public service at reasonable rates, and to protect the public utilities "in the enjoyment of their rights" so far as such protection adequately secures the more important public interests. As the Supreme Court of Illinois recently said on this point:[57]

> "It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the

[56] 99 W. Va. 157, 128 S. E. 89 (1925).
[57] West Suburban Transportation Co. v. Chicago and West Towns Ry. Co., 309 Ill. 87, 91-92, 140 N. E. 56 (1923).

case if other competing lines were authorized to serve the public in the same territory."

Moreover, that this latter interpretation of the new policy is the correct interpretation is strikingly emphasized in the latest adjudication of the West Virginia Court.[58] In that case, as has been intimated in part, the State Road Commission had granted a certificate of public convenience to a new utility rather than to a utility organized by the established utility. But the Supreme Court of Appeals held that such a state-granted certificate of convenience authorizing competition is not conclusive as to whether such competition is legally permissible. In other words, if the public interests in having efficient public service rendered most "economically and by the best equipment reasonably necessary" and the public interest in protecting the established utility will be better served by preventing such competition, the administrative determination that such competition is desirable is not conclusive. Courts are, and should be, extremely reluctant to go behind administrative determinations of fact—here the finding of fact that public convenience and necessity justified granting the certificate to a competitor of the established utility. Therefore, the decision is highly important in showing that the courts are willing to go to great lengths in promoting the now recognized important public interest in preventing unreasonable competition between public utilities.

The Supreme Court of Ohio has recently reached substantially the same conclusion in the case of *Cincinnati Traction Company* v. *Public Utilities Company of Ohio*.[59] In that case the Public Utilities Commission of Ohio had granted a certificate of public convenience and necessity to a competing utility to operate motor transportation service over a route that was already adequately served by other utilities. The court reviewed the evidence upon which the Commission acted and refused to sanction such unreasonable competition.

A more interesting application of the modern policy is found in *Chicago Motor Bus Company* v. *Chicago Stage*

[58] Reynolds Taxi Co. v. Hudson, *supra* n. 12.
[59] 112 Oh. St. 699, 148 N. E. 921 (1925).

Company.[60] In that case an established motor transportation company had been satisfactorily serving certain sections of Chicago and had spent considerable money in developing its service. The state public utilities commission issued a certificate of convenience and necessity for similar service in other parts of the city to a new utility rather than to the old utility. On appeal the Supreme Court of Illinois held that, as there was no showing that the new competing utility was in a position to render better service to the public than the old one, the action of the commission must be reversed. Said the court:[61]

> "It seems obvious to us that in view of the fact that appellant had been so long in the field, had spent large sums of money in securing the right to operate and in developing its business, as against the Chicago Stage Company, which had just come into existence and had spent no money in the enterprise, the former should in all justice be entitled to the preference *unless the public interests would be best served by the latter company.*"

The italicized phrase admirably shows where the emphasis properly lies in such cases. The true criterion is whether, under governmental regulation, one utility alone or whether two or more competing utilities will better serve the "public interests," not only the public interests in having proper public service at reasonable rates but the public interest in adequately protecting the individual interests of the utilities. And, in general, as we have seen the public interests will be better served by one regulated utility without competition. But where for any reason it appears that one utility cannot be relied upon, under governmental regulation, to serve the community properly, it is obvious that, in general, a policy of regulated competition, rather than a policy of regulated monopoly, would be better, unless it further appears that two or more competing utilities could not be relied upon to render adequate service at reasonable rates and that one regulated utility without competition would serve the community better than two or more competing utilities.

Of course, where there are two or more competing utili-

[60] 287 Ill. 320, 122 N. E. 477 (1919).
[61] *Ibid.*, p. 328. Italics ours.

ties already in the field and one could render the service better than all combined, the new policy does not necessarily or even ordinarily mean that all but one must be discontinued either in whole or in part, because the public interest in protecting the individual interest of the other utility or utilities might outweigh the public interest in having better public service. In other words, a policy of regulated competition should often be applied. This would be particularly true, as a general rule, in regard to such public utilities as railroads where, as a practical matter, much of the plant could not be used for other purposes. But in some cases a contrary conclusion should be reached. For example, suppose that two competing railroads that cannot survive in competition contract to combine. Or suppose that two rival bus lines simultaneously started, before the days of certificates of convenience, to transport between fixed termini. And it now appears that one bus is all that is needed adequately to serve the public between those points. What should be done? To continue such competition would, in the long run, generally deteriorate the public service and ruin the competing public utilities. When certificates of convenience are sought for the first time, it would seem that the commission should grant a certificate to only one of these bus lines, *viz.*, the one which appeared the more likely to render the better service, or, if this could not be determined, the equities being equal, priority of application, it would seem, should govern.[62] A policy of regulated monopoly would better secure the more important interests. Most of the property of the other utility could, as a practical matter, be used for other purposes, so that the individual interest of the other utility and the public interest in protecting that individual interest, would not, as in the average railroad case, outweigh the public interest in having more efficient and economical public service.

But suppose that the commission has granted certificates of convenience to each of the utilities to operate for five years. What can be done to protect the public interest against "ruinous competition"? Where a statute provides,

[62] *Cf.* Chicago Motor Bus Co. *v.* Chicago State Co., *supra*, n. 60.

as the West Virginia statute provides,[63] that the "commission shall have the power to issue any certificate of convenience for such length of time not in excess of five years as in its judgment the service proposed and the capital to be invested in such proposed service may justify," it would seem that ordinarily, instead of adopting a policy of regulated monopoly, the law must, until the end of the legislatively and administratively authorized period, generally apply a policy of regulated competition. But a policy of regulated monopoly should be applied to an agreement not to compete in the form of one utility agreeing to withdraw. Also, if at the time of granting such certificates, it was clear that public convenience would be better served by only one utility, then, under some decisions including the latest West Virginia decision,[64] perhaps it should be held that the action of the commission in granting certificates to more than one utility was unreasonable and therefore should be reversed. For otherwise the law would be securing the comparatively less important individual interest of the utility (and perhaps not that) and the comparatively less important public interest, if any, in securing such individual interest and, in so doing, would be sacrificing the paramount public interest in having public service rendered, as the West Virginia Court expressed it, "most efficiently and economically and by the best equipment reasonably necessary."[65]

To sum up, the recent trend of judicial, administrative and legislative[66] opinion seems to be, broadly speaking, to abandon the policy of free competition in public service and to substitute a policy of regulated monopoly or a policy of regulated competition where it appears that the latter rather than the former would better secure the "public interest" in having proper public service and the "public interest" in reasonably protecting the individual interests of competing utilities. If the private interests of a competitor or would-be competitor do not promote these paramount public in-

[63] Acts of West Virginia, 1925, c. 17, §82, Class H. There is a proviso as to vehicles not operated "over a regular route or between fixed termini, or having a regular time schedule."

[64] Reynolds Taxi Co. *v.* Hudson, *supra* n. 12.

[65] *Ibid.*

[66] See "Current Legislation," 24 COL. L. REV. 528 (1924).

terests, then, to the extent that such private interests are outweighed by the public interests, such interests should be sacrificed for the public good. Only thus will the true end of law, to secure a maximum of interests with a minimum sacrifice of other interests, be adequately subserved. Only thus will there be proper progress in public service. And as the United States Supreme Court has admirably said:[67]

> "There must be progress, and if in its march private interests are in the way they must yield to the good of the community."

[67] Hadacheck *v.* Sebastian, 239 U. S. 894, 410 (1915).